

APPEAL NO. 021163
FILED JUNE 10, 2002

This appeal arises pursuant to the Texas Workers' Compensation Act, TEX. LAB. CODE ANN. § 401.001 *et seq.* (1989 Act). A contested case hearing was held on April 11, 2002. The hearing officer determined that the appellant (claimant) is not entitled to supplemental income benefits (SIBs) for the 9th, 10th, and 11th quarters; that the respondent (carrier) is relieved of liability for SIBs for the period from September 24 through December 13, 2001, because of the claimant's failure to timely file the 9th quarter Application for [SIBs] (TWCC-52); and that the claimant's compensable injury of _____, does not extend to include the diagnoses of severe central spinal stenosis, lateral recess stenosis and bilateral neuro foraminal stenosis at L4-5, surgical lesion at L4-5, and transitional vertebrae with unilateral sacralization and new arthrosis on the left. The claimant appeals the determinations of nonentitlement to 9th, 10th, and 11th quarter SIBs, and the extent-of-injury determination. The claimant attaches three photographs to his appeal, in addition to a note which explains that the photographs show how swollen his legs are, and this precludes him from working. The carrier urges affirmance. The determination that the carrier is relieved of liability for a portion of the 9th quarter because of untimely filing for SIBs has not been appealed and has become final. Section 410.169.

DECISION

Affirmed.

In deciding whether the hearing officer's decision is sufficiently supported by the evidence, we will only consider the evidence admitted at the hearing. We will not generally consider evidence not submitted into the record, and raised for the first time on appeal. Texas Workers' Compensation Commission Appeal No. 92255, decided July 27, 1992. To determine whether evidence offered for the first time on appeal requires that a case be remanded for further consideration, we consider whether it came to the appellant's knowledge after the hearing, whether it is cumulative, whether it was through lack of diligence that it was not offered at the hearing, and whether it is so material that it would probably produce a different result. Texas Workers' Compensation Commission Appeal No. 93111, decided March 29, 1993; Black v. Wills, 758 S.W.2d 809 (Tex. App.-Dallas 1988, no writ). We do not find that to be the case with the photographs that the claimant attached to his request for review which were not offered into evidence at the hearing.

Eligibility criteria for SIBs entitlement are set forth in Section 408.142(a) and Tex. W.C. Comm'n, 28 TEX. ADMIN. CODE § 130.102 (Rule 130.102). The SIBs criterion in issue is whether the claimant made a good faith effort to obtain employment commensurate with his ability to work during the qualifying periods, which were from June 12, 2001, through March 11, 2002. The claimant claimed he had no ability to work during the qualifying periods. Rule 130.102(d)(4) provides that an injured employee has

made a good faith effort to obtain employment commensurate with the employee's ability to work if the employee has been unable to perform any type of work in any capacity, has provided a narrative report from a doctor which specifically explains how the injury causes a total inability to work, and no other records show that the injured employee is able to return to work. The hearing officer found that the claimant had some ability to work, and that the claimant did not provide a credible narrative from a doctor which specifically explained how the claimant's injury caused a total inability to work. In addition, Dr. P, the Texas Workers' Compensation Commission-appointed designated doctor for the purpose of conducting an examination of the claimant pursuant to Section 408.151(b), concluded that the claimant should be able to return to work in a job that did not require heavy lifting.

The hearing officer is the sole judge of the weight and credibility of the evidence. Section 410.165(a). As the finder of fact, the hearing officer resolves the conflicts in the evidence and determines what facts have been established. The hearing officer determined that the claimant did not attempt in good faith to obtain employment commensurate with the claimant's ability to work and consequently concluded that the claimant is not entitled to SIBs for the 9th, 10th, and 11th quarters. We conclude that the hearing officer's decision is supported by sufficient evidence and that it is not so against the great weight and preponderance of the evidence as to be clearly wrong and unjust. Cain v. Bain, 709 S.W.2d 175 (Tex. 1986).

Extent of injury is also a factual question for the hearing officer to resolve. The hearing officer determined that the claimant's compensable injury of _____, does not extend to include the diagnoses listed above. She found that the claimant failed to prove that he sustained an aggravation of the preexisting lumbar spine condition, and that the claimant's evidence was insufficient to establish a causal relationship between the diagnosed conditions and the compensable injury of _____. The Appeals Panel will not disturb the challenged factual findings of a hearing officer unless they are so against the great weight and preponderance of the evidence as to be clearly wrong or manifestly unjust, and we do find them so in this case. Cain, supra; In re King's Estate, 150 Tex. 662, 244 S.W.2d 660 (1951).

We affirm the decision and order of the hearing officer.

The true corporate name of the insurance carrier is **AMERICAN HOME ASSURANCE COMPANY** and the name and address of its registered agent for service of process is

**CORPORATION SERVICE COMPANY
800 BRAZOS, SUITE 750, COMMODORE 1
AUSTIN, TEXAS 78701.**

Michael B. McShane
Appeals Judge

CONCUR:

Gary L. Kilgore
Appeals Judge

Robert W. Potts
Appeals Judge